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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 738

EULA CRAIG, ELLIOTT H. CRAIG and WOODROW PARNELL,
Petitioners,

vs.

OLIN MATHIESON CHEMICAL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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ARGUMENT

Petitioners seek a Writ of Certiorari upon the grounds that the 7th Circuit Court of Appeals failed to follow **Erie R. R. v. Tompkins**, 304 U. S. 64, which holds that in a case based solely upon diversity of citizenship, a Federal

Court must apply the substantive law of the state in which it sits. (Petition for Writ of Cert., p. 11.) Petitioners contend that the Circuit Court of Appeals failed to apply the substantive law of the State of Illinois regarding the following factors, to wit:

A. The direction of Jury Verdicts and the entry of Judgments N. O. V.; and

B. Negligence and Contributory Negligence as Matters of Law.

The Petitioners are incorrect. The Court of Appeals, in the case at bar, acknowledged the rule and declared:

". . . we are obligated to follow the law as announced by the Illinois Courts."

Respondent contends that the Court of Appeals for the Seventh Circuit not only asserted this obligation in its opinion, but expressly considered, cited and followed the law as set forth by the Supreme Court of Illinois and the Illinois Appellate Courts with respect to the foregoing factors which are hereinafter examined in detail.

A

Petitioners state the Court of Appeals failed to follow the Illinois rule as to when verdicts ought to be directed and judgment notwithstanding the verdict entered as set forth in the case entitled **Pedrick v. Peoria and Eastern Railroad Co.**, 37 Ill. 2d 494, 229 N. E. 2d 504. Since Petitioner places such great reliance on this case an analysis of it is in order. In the Pedrick case plaintiffs brought an action against a railroad company for injuries suffered in a crossing accident. On apeal to the Appellate Court the case was reversed without remandment on the ground the jury's finding that defendant was negligent was against the manifest weight of the evidence and that plaintiffs

were guilty of contributory negligence as a matter of law. The Supreme Court granted leave to appeal and affirmed the judgment of the Appellate Court. The Illinois Supreme Court made an exhaustive review of the law in Illinois and the law of other states as to under what circumstances a court should either direct a verdict or enter judgment notwithstanding the verdict. It pointed out that a number of rules have been followed, namely, (1) whether a "mere scintilla" of evidence to the contrary would prevent a directed verdict; (2) whether all the evidence in a case may be considered by the court in directing a verdict; (3) whether only the evidence against the party who has moved for a directed verdict may be considered by the Court. The Illinois Supreme Court adopted the second rule enunciated above, saying on page 509 of the opinion in 229 N. E. 2d,

> "This Court has said with some frequency that negligence and contributory negligence become questions of law when all of the evidence, viewed in its aspect most favorable to the party against whom the court would rule, is such that reasonable minds would reach the same conclusion. (See, e. g., Jines v. Greyhound Corp., 33 Ill. 2d 83, 86-87, 210 N. E. 2d 562; Geraghty v. Burr Oak Lanes, Inc., 5 Ill. 2d 153, 162, 125 N. E. 2d 47; Sims v. Chicago Transit Authority, 4 Ill. 2d 60, 67, 122 N. E. 2d 221.)"

The Court goes on to say on page 510 of the opinion in 229 N. E. 2d,

> "Constitutional guaranties are not impaired by direction of a verdict despite the presence of some slight evidence to the contrary (Chamberlain, Blume, 'Origin and Development of the Directed Verdict,' 48 Mich. L. Rev. 555, 576-7), for the right to a jury trial includes the right of a jury verdict only if there are factual disputes of some substances."

In their Brief at page 12, Petitioners assert the Court of Appeals was guilty of a patent violation of the standard established in the **Pedrick** case when it said,

> "While the question is not free from doubt, we think the proof was insufficient to establish the charge of negligence against Olin."

We submit this was not a violation of the **Pedrick** standard. The Illinois Supreme Court does not require "freedom from doubt" in this situation. All of the evidence may be and should be considered by the Court and when in its judgment "all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand" the Court should direct a verdict or give judgment n. o. v.

Since the **Pedrick** decision, the Illinois Appellate Court for the Second District in the case entitled **Perec v. Little**, 106 Ill. App. 2d 308, 245 N. E. 2d 306, (Feb. 25, 1969) said on page 308 of 245 N. E. 2d,

> "Since **Pedrick** the determination of whether or not a verdict should be directed is not made to depend on whether a search of the record reveals **any** evidence which might reasonably favor the non-moving party. The trial court **now may view, and weigh, all the evidence**, and even though there be evidence tending to substantiate the non-moving party's case, if that evidence is so overwhelming contradicted by the remaining evidence that a verdict based thereon could never stand, then the court may direct a verdict for movant . . ." (Emphasis supplied).

See also **Dimitrijevic v. Chicago Wesley Memorial Hospital**, 92 Ill. App. 2d 251, 236 N. E. 2d 309 (Jan. 22, 1968) and **Clark v. Quincy Housing Authority**, 86 Ill. App. 2d 458, 229 N. E. 2d 781 (Sept. 19, 1967).

B

The next question is whether the Court of Appeals in the case at bar correctly applied the Illinois law in holding the defendant, Olin, was not negligent as a matter of law and that plaintiffs were contributorily negligent as a matter of law.

It is apparent from the Statement of Facts in the Petition and from the opinion of the Court of Appeals that plaintiffs and their employer, the general contractor, were very much aware of the alleged oily and greasy condition of the premises which plaintiffs claim caused the injury. Plaintiff, Elliott Craig, inspected the work site two weeks before starting to work in the area. After they had been working an hour or so, plaintiff's clothes became saturated with oil and grease. This was certainly not a latent defect which the defendant, Olin, hid from anyone.

Petitioner relies on the case of **Calvert v. Springfield Electric Light and Power Company**, 231 Ill. 290, 83 N. E. 2d 184, as establishing the rule that an owner or occupant of land who by invitation, express or implied, induces or leads others to go upon premises for any lawful purpose is liable for injuries occasioned by the unsafe condition of the land. But the **Calvert** case does not support the Petitioner's position, since in that case, the Court conditions liability on the part of the owner as to the unsafe condition of the land **known to him and not known to the person whom he invites on the premises** (See citation on page 13 of Petition). If there are hidden dangers upon the premises known to the owner and not to an invitee, the owner must warn the invitee; not so, if the danger is apparent to the invitee.

In the case of **Schoen v. Harris**, 108 Ill. App. 2d 186, 246 N. E. 2d 849 (April 14, 1969), the Illinois Appellate Court for the Third District applying the standard set

forth in **Pedrick v. Peoria & Eastern R. Co.**, supra, entered judgment in favor of the defendant owner where the plaintiff was injured while using a "bongo board" on defendant's premises because "the conditions affecting the use of the device were readily apparent to plaintiff."

In the case of **Clark v. Quincy Housing Authority**, 86 Ill. App. 2d 458, 229 N. E. 2d 780, the Illinois Appellate Court for the Fourth District applying the standard set forth in the **Pedrick** case affirmed a directed verdict in favor of an owner of premises where the invitee was aware of the condition of the premises which allegedly caused his injury. The Court in the **Clark** case held that plaintiff failed to prove actionable negligence on the part of the defendant owner and also failed to show he was in the exercise of ordinary care in his own behalf.

In the case of **Ragni v. Lincoln-Devon Bonnieland, Inc.**, 91 Ill. App. 2d 172, 234 N. E. 2d 168 (Jan. 15, 1968), cited by the Court of Appeals in its opinion in the case at bar, the Illinois Appellate Court for the First District, Fourth Division, cited the **Calvert** decision. It held that the owner of premises was **not liable for a condition known to the plaintiff.**

In its opinion in the case at bar the Court of Appeals cited another Illinois case, namely, **National Builders Bank of Chicago v. Schuham**, 319 Ill. App. 546. In that case the Illinois court cited with approval the decision of the court of a sister state which said that it is the rule that the owner of property owes to an independent contractor and his servants at work thereon the duty of exercising reasonable care to have the premises in a safe condition for the work **unless the defects responsible for the injury were known to the contractor.**

It is obvious that the opinion of the Court of Appeals followed the **Calvert** rule, the **Pedrick** rule and the other cases decided in Illinois.

Petitioners cite two other Illinois cases in their Petition, neither of which has any application to the case at bar, namely, **Ney v. Yellow Cab Company**, 2 Ill. 2d 74, 117 N. E. 2d 74, and **Svenson v. City of Rockford**, 9 Ill. 2d 122, 136 N. E. 2d 777. The **Ney** case dealt with the violation of a statute as prima facie evidence of negligence and whether such a violation was the proximate cause of the injury. The Court gave a rather stirring defense of the jury system in its opinion. However, the Court did not have the **Pedrick** rule to apply since the **Pedrick** case was decided 13 years later. Further, the Court held in essence that reasonable men might differ on the question where there were special circumstances surrounding the defendant's **violation of a statute** which might have been the proximate cause of the damage that followed.

While violation of a statute may be prima facie evidence of negligence, such a question was **not** presented to the Court of Appeals in this case, for **there was no question in this case of a statutory violation.**

The **Svenson** case was decided in 1956. The Court said on page 127,

> "To be guilty of contributory negligence as a matter of law it must appear that all reasonable minds would agree that assuming the facts **as presented by the plaintiff** and all reasonable inferences that may be drawn therefrom in her favor, plaintiff is nevertheless guilty of contributory negligence" (Emphasis supplied).

We respectfully submit this is **not** the rule established in the **Pedrick** case decided some eleven years later. Decisions such as **Ney** and **Svenson** in addition to others led to the **Pedrick** decision in which the Illinois Supreme Court set forth a new standard in Illinois for the benefit of courts and litigants in the future, thereby modifying any earlier opinions to the contrary.

C

A reading of the opinion of the Court of Appeals (Petitioner's Appendix) reveals the Court was influenced to enter judgment in favor of Olin by the language contained in the contract between plaintiffs' employer and Olin. Several clauses of that contract are recited verbatim in the opinion. As stated by the Court of Appeals,

> "All equipment, including the oxygen-acetylene torch used by the plaintiffs, was owned and furnished by the contractor. Olin removed its employees from the restricted area and **had no control over or the right to direct the manner and means by which plaintiffs as employees of the contractor performed their work**" (Emphasis supplied).

Plaintiffs, Craig and Parnell, knew of the importance of keeping the connections of the torch free from dirt and oil and **they were the only persons to ever handle the torch and the oxygen tank on the entire day of their injury.** No one knows or testified how oil or grease got **inside** the fittings to explode in the manner described by Professor Gerald Dreifke. But, all of the evidence revealed that the only persons to handle the fittings were the plaintiffs.

Since by contract Olin had no control over or the right to direct the manner and means of the work done by plaintiffs, since it is undisputed that Olin turned the premises over completely to the contractor and his employees, and since the only persons to touch or handle the equipment in question which exploded were the plaintiffs, who admitted that they were aware the fittings on the equipment should be free from oil or grease, the only conclusion that could be reached by the Court of Appeals was that Olin was free from actionable negligence proximately causing plaintiffs' injuries.

CONCLUSION

It is apparent from the foregoing that the Court of Appeals properly applied the standard for direction of verdicts established by the Courts of Illinois and followed and cited the Illinois precedents on the substantive questions of law involved. The Petition for Certiorari should be denied.

Respectfully submitted

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